IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2005 Session

# STATE OF TENNESSEE v. MICKEY LEE WILLIAMS

**Appeal from the Circuit Court for Grainger County**
**No. 3689 O. Duane Slone, Judge**

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**No. E2004-01617-CCA-R3-CD - Filed September 15, 2005**

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The Appellant, Mickey Lee Williams, was convicted by a Grainger County jury of second degree murder and arson and received an effective sentence of twenty-three years imprisonment. On appeal, Williams raises the following issues for our review: (1) whether the trial court erred by allowing the State to introduce character evidence of his propensity for violence; (2) whether the testimony of a prosecution witness should have been excluded due to the State's untimely notice to the defense that the witness would be testifying at trial; (3) whether the trial court misinstructed the jury on self-defense; (4) whether the evidence was sufficient to support his convictions; and (5) whether his sentences violate *Blakely v. Washington*. After review of the record, we conclude that because Williams' motion for new trial was not timely filed, issues (1), (2), and (3) are waived. After review of issues (4) and (5), we find no error and affirm the judgments of conviction. Notwithstanding our holding of no error, the record reflects that the trial court, on June 7, 2004, initially imposed an effective sentence of twenty-four years for second degree murder. On November 8, 2004, the trial court reduced this sentence by one year. As asserted by the State on appeal, because Williams' sentence for second degree murder became final thirty days after its entry, the trial court was without jurisdiction to modify or reduce the sentence. Accordingly, we remand for reinstatement of Williams' initial sentence of twenty four years for second degree murder. Williams' sentence of five years for arson is affirmed.

**Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed with Remand for Reinstatement of Sentence**

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Edward C. Miller, Public Defender, Dandridge, Tennessee, for the Appellant, Mickey Lee Williams.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### Factual Background

Around 11:30 A.M. on March 12, 2002, the Appellant and his longtime friend, Billy Joe Coffey, purchased three eighteen packs of beer which they began drinking at Coffey's residence in Rutledge. At approximately 2:30 or 3:00 P.M., the two went to the home of the Appellant's brother, Louis Williams, on Poor Valley Road in Grainger County to play cards and continue in their drinking endeavors. While there, the Appellant professed his love for Patricia Johnson. Johnson lived across the street from Louis Williams, and the Appellant made several visits to the Johnson home that afternoon to see Mrs. Johnson. Coffey and his wife returned the Appellant to his home a little after 7:35 P.M. that evening. Coffey testified that the Appellant had drunk at least a case of beer.

Patricia Johnson, the victim's wife, testified that the Appellant came to her home on the afternoon of March 12th while her husband was away and asked whether "God would forgive him of murder." She responded that murder was wrong. Mrs. Johnson explained that she had developed a romantic relationship with the Appellant around October of 2001 when her husband was on the road for long periods of time as a truck driver and that she had tried to end the relationship in January of 2002 when she told her husband about the affair.

Johnny Bowens, who lived on Poor Valley Road near the Johnsons, testified that the Appellant came to his home on the evening of March 12th and cryptically "told [him] to watch and learn" and to "put it in the newspaper" before going up the road toward the Johnson house. Barbara Bowens, who also lived on Poor Valley Road, received a phone call from the Appellant on the night of the incident, inquiring whether the victim was at his house. She testified that she thought the Appellant was joking when he stated during the conversation that he loved Mrs. Johnson and was going to kill Mrs. Johnson's husband.

Around 9:30 P.M., the Appellant returned to the Johnson home. The victim, Terry Johnson, answered the door, and the two began to argue. Mrs. Johnson testified that her husband asked the Appellant to leave and told the Appellant that they would talk the next day. The Appellant walked out the door but quickly reentered with a six pack of beer, pointing his finger at the victim and calling him a son of a bitch. The Appellant then went back outside, and the victim followed. Barbara Bowens, Johnny Bowens, and Shawn Bolen, all neighbors on Poor Valley Road, heard what sounded like "a bunch of dogs fighting." Mrs. Johnson heard "grunting noises and thumping outside" and tried to call the police. Johnny Bowens and Bolen both testified that they saw the victim shove the Appellant first while on the porch. The victim was heard telling the Appellant to stay away from his family and get off of his property. The fight then moved to the yard. Soon thereafter, the victim was seen holding his stomach and retreating to his home with the Appellant following. The Appellant was yelling to the victim that "he [would] put his soul in hell." Mrs. Johnson testified that when her husband came inside, he told her to call the police. "[H]is right arm was cut, and he was holding his arm up, and his left hand was on his chest." Blood was everywhere. The victim went into the bathroom and closed the door. The Appellant then came inside the house

and held a knife to Mrs. Johnson's throat and pushed her, along with her fifteen-month-old and five-year-old daughters, into the back bedroom. Afterwards, the Appellant beat on the bathroom door, yelling and screaming. Mrs. Johnson and her two children escaped through a bedroom window and hid in an old truck parked nearby.

Shawn Bolen testified that when he saw what was happening, he went to get the Appellant's brother Steve who lived down the street. The Appellant came out of the Johnson's house, and Steve called out to him. The Appellant walked to Steve's house with blood covering his pants and asked for a cigarette lighter. He made a slicing motion across his throat and said that Terry Johnson was dead and "had gone to hell."

Officer Jeff Daniel with the Rutledge Police Department testified that upon responding to the scene at the Johnson's home, he knocked on the door, but no one answered. There was blood both on the front porch and in the yard. Daniel drove up the road to Steve Williams' house, where Williams and Bolen were on the front porch. The Appellant was standing nearby with a knife in his hand and blood covering his pants. When Officer Daniel asked the Appellant what was going on, the Appellant responded, "I killed him. . . . He hit me. . . . I killed him. . . . And I'm tired of everybody out here." When Daniel tried to question him further, the Appellant walked back across the road to the Johnson's house. Officers at the scene asked the Appellant to come out of the house, but he refused, repeatedly opening and shutting the door. When asked for access to the house to check on the victim, the Appellant replied, "I'll drag him to you." He later announced, "He's too big. I can't drag him." Shortly thereafter, a fire was seen engulfing the interior of the house, and the Appellant was observed running from the residence. Upon exiting the house, the Appellant ran toward Chief Holt, who ordered the Appellant to drop the knife. The Appellant refused and was shot by Chief Holt.

Approximately four hours after the incident occurred, a blood sample was taken from the Appellant which indicated a blood alcohol level of 0.11 percent. Special Agent Russell Robinson with the State of Tennessee's Bomb and Arson Section investigated the murder and fire. He testified that the fire had multiple points of origin and concluded that it was "intentionally set." During the investigation, Robinson was forced to enter the bathroom through a window because the victim's body was against the door. Additionally, he noted that there were marks on the bathroom door which appeared to be made by a sharp-bladed tool. He found a Bic lighter on the kitchen table and a twenty-two inch hunting knife on the front porch. The victim's blood was found on the Appellant's pants and on the knife. Doctor Cleland Blake performed an autopsy on the victim. He described five deep stab wounds penetrating into the lungs and the vena cava, and he found the cause of death to be internal and external hemorrhaging.

At trial, the Appellant testified that on the night of the incident, he became intoxicated after drinking beer and did not know his purpose in going to the Johnson residence. He related that the victim hit him with a broom and tried to choke him, and, further, that he "didn't have no choice," that he "had to cut at [the victim]" to get him off. Regarding the fire, the Appellant testified that he was "probably trying to kill [himself]. I's panicked, scared. I don't know, really."

The Appellant was indicted by a Grainger County grand jury on August 19, 2002, for first degree murder, first degree felony murder, aggravated arson, arson, reckless burning, aggravated kidnapping, two counts of especially aggravated kidnapping of a child under thirteen, five counts of aggravated assault, and resisting arrest. All of the counts except first degree murder, arson, and aggravated assault were dismissed by the State on the morning of trial. The Appellant's trial commenced on April 21, 2004, with the jury returning guilty verdicts for second degree murder and arson on April 22. A sentencing hearing was held on June 7, 2004, and the trial court sentenced the Appellant to twenty-four years as a violent offender for second degree murder and to five years for arson. The sentences were ordered to be served concurrently. The Appellant filed a notice of appeal on June 30, 2004. A motion for new trial was filed on November 1, 2004, which was denied by the trial court. The Appellant filed a "motion to set aside and reinstate judgment" on October 12, 2004, "for the purposes of giving the defendant the opportunity to file a Motion for New Trial," which the trial court granted on November 18, 2004.[1] The Appellant's motion for new trial was denied; however, on November 8, 2004, the trial court modified the Appellant's sentence for second degree murder to twenty-three years in the Department of Correction.

**Analysis**

As a preliminary matter, the State contends that the Appellant failed to timely file a motion for new trial; thus, all issues except sufficiency of the evidence and sentencing are waived. A motion for new trial "shall be made . . . within thirty days of the date the order of sentence is entered." Tenn. R. Crim. P. 33(b). This provision is mandatory, and the time for filing may not be extended. Tenn. R. Crim. P 45(b); *see also State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997); *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). The thirty-day rule is jurisdictional, and an untimely motion is a nullity. *Dodson*, 780 S.W.2d at 780. It deprives the defendant of the opportunity to argue on appeal any issues that should have been raised in the motion for new trial. *Martin*, 940 S.W.2d at 569. Unlike the untimely filing of the notice of appeal, this court does not have the authority to waive the untimely filing of a motion for new trial. Tenn. R. App. P. 4(a); *see also State v. Givhan*, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980).

The judgments of conviction in this case were entered on June 7, 2004. The Appellant filed a motion for new trial on November 1, 2004, almost four months beyond the thirty-day requirement. Thus, the untimely motion is a nullity. Due to the untimely filing of his motion for new trial, the Appellant has waived the following issues: (1) whether the trial court erred by allowing the State to introduce character evidence of his propensity for violence; (2) whether the testimony of a prosecution witness should have been excluded due to the State's untimely notice to the defense that the witness would be testifying at trial; and (3) whether the trial court misinstructed the jury on self-defense. We decline plain error review because these issues do not rise to the level of affecting a

[1] No rule exists under the Tennessee Rules of Criminal Procedure or other authority that authorizes the trial court to set aside the entry of a judgment that has become final. To do so would circumvent the thirty day provision of Tenn. R. Crim. P. 33(b).

substantial right which would necessitate review in order to do substantial justice. *See* Tenn. R. Crim. P. 52(b).

**I. Sufficiency of the Evidence**

On appeal, the Appellant asserts that the proof adduced at trial would only justify a finding of voluntary manslaughter. He contends that "the victim first struck the [Appellant] and then the two began to have mutual combat." The State argues the evidence was sufficient based on the Appellant's plan to kill the victim. We agree with the State.

In considering this issue, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

"A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Under our current code, second degree murder is defined as the "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1) (2003). Voluntary manslaughter is "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a) (2003). "The essential element that . . . distinguishes these two offenses is whether the killing was committed 'in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.'" *State v. Williams*, 38 S.W.3d 532, 538 (Tenn. 2001) (quoting Tenn. Code Ann. 39-13-211(a)).

In this case, the trial court instructed the jury concerning the elements of the indicted offense of first degree murder, as well as the lesser included offenses of second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide. The court also instructed the jury as to the difference between second degree murder and voluntary manslaughter. Considering

the evidence in a light most favorable to the State, the evidence overwhelmingly shows that the Appellant had voiced his desire and intent to kill the victim throughout the day. Indeed, the Appellant told Mr. Bowen to "watch and learn." Ignoring the apparent hostility between the two, the Appellant, armed with a hunting knife, entered into the Johnson property looking for the victim. After refusing to leave as requested, the Appellant repeatedly stabbed the victim with a twenty-two inch hunting knife. The Appellant then chased the victim into his house proclaiming that "he [would] put his soul in hell." Clearly, these facts demonstrate a "knowing" killing of the victim. *See* Tenn. Code Ann. § 39-13-210 (a)(1).

By its verdict of guilt for second degree murder, the jury implicitly rejected the Appellant's arguments that he acted in self defense or in passion resulting from adequate provocation. Based upon the proof at trial, we conclude that the evidence is legally sufficient to support the Appellant's conviction for second degree murder beyond a reasonable doubt.

The proof is also sufficient to support the jury's verdict of guilt for arson. Tennessee Code Annotated section 39-14-301 (2003) provides in pertinent part: "(a) [a] person commits an offense who knowingly damages any structure by means of a fire or explosion: (1) without the consent of all persons who have a possessory, proprietary or security interest therein." The proof in this case establishes that the fire was intentionally set, and, at trial, the Appellant admitted setting the house on fire.

**II. Sentencing**

The Appellant argues that the trial court's imposition of enhanced sentences violates his Sixth Amendment right to trial by jury as recognized by the Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).[2] First, we would note that this issue is waived because it was not raised by the Appellant at the sentencing hearing. *See State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005). Moreover, our supreme court held in *Gomez* that the Sentencing Reform Act of 1989 does not violate the Sixth Amendment guarantee of a jury trial and was, thus, not affected by the *Blakely* decision. *Id*. Accordingly, this issue is without merit.

Finally, with regard to the State's assertion on appeal that the trial court's modification of the Appellant's sentence for second degree murder from twenty-four to twenty-three years on November 8, 2004 was error, we agree. The judgment of a trial court becomes final thirty days after entry, thus, the trial court lost jurisdiction to alter or amend the sentence once the judgment became final. Tenn. R. App. P. 4; *James Clark v. State*, No. W2004-00326-CCA-R3-CD (Tenn. Crim. App. at Jackson, Feb. 28, 2005) (citing *Ray v. State*, 576 S.W.2d 598, 602 (Tenn. Crim. App. 1978); *State v. Bouchard*, 563 S.W.2d 561, 563-64 (Tenn. Crim. App. 1977)). As such, the trial court was without jurisdiction to modify the Appellant's sentence. Accordingly, we reinstate the Appellant's original twenty-four year sentence for second degree murder.

[2]The Appellant presents no challenge to his enhanced sentences under the 1989 Sentencing Act.

## CONCLUSION

Based on the foregoing, we conclude that the evidence is sufficient to support the Appellant's convictions for second degree murder and arson and that the trial court did not violate *Blakely* in sentencing the Appellant. For the reasons stated above, the Appellant's twenty-four year sentence for second degree murder is reinstated. The Appellant's five-year sentence for arson is affirmed.

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DAVID G. HAYES, JUDGE